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No. 884.

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In the Supreme Court of the United States

October Term, 1942.

JANE M. STIMSON and BLANCHE M NEWMAN,
Petitioners,

vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF.

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Subject Index

	Pages
PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF	1-20
Argument	1
Summary	1
I.	2-5
A. Statements in Respondents' brief that petitioners contended in the trial court and in the Circuit Court of Appeals that the lease terminated because respondents breached an implied covenant to market oil are not sustained by the record	2-3
B. Respondents' statement that petitioners submitted this case to the Circuit Court of Appeals upon the theory that the Supreme Court of Montana had not passed directly upon the point involved is not sustained by the Record	3-5
II. Reply to Respondents' assertion in Part II of their Brief that petitioners state no valid grounds for the issuance of Write of Certiorari	6-9
III. Petitioners were not required to give notice of intention to declare the lease forfeited for failure to produce oil	9-10
IV. No question of implied covenant to market oil is involved in the automatic termination of a lease, pursuant to the thereafter clause, by reason of cessation of production of oil	10-11
V. No question of waiver of any right by the lessors is involved in this case	12-13
VI. Reply to Respondents' argument as to dictum (Resps.' Br., pp. 19 & 20)	13-14

Pages

VII. Reply to Respondents' argument concerning the construction of an oil and gas lease (Resps.' Br. pp. 21 & 22) 14-15

VIII. The decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Montana (Part II of Respondents' Brief) 16

IX. Reply to Respondents' statement of "Facts Supplemental to those stated in petition and brief of Petitioners." (Resps.' Br., Part I, pp. 1-10) 17-20

Table of Authorities Cited

	Pages
Alabama Power Co. v. Ickes, 302 U. S. 464	16
Berthelote v. Loy Oil Co., 95 Mont. 434	5, 11
Brewster v. Lanyon Zinc Co., 140 Fed. 801	11
Continental Oil Co. v. Osage Oil & Ref. Co., 69 Fed. (2d) 19	6, 7, 16
Empire Theatre Co. v. Cloke, et al., 53 Mont. 183, 163 Pac. 107	13
Hinerman v. Baldwin, 67 Mont. 417, 215 Pac. 1103	14
Johnson v. Metropolitan Life Ins. Co., 107 Mont. 133, 83 Pac. (2d) 922	14
MacGregor v. State Mutual Life Assur. Co., 315 U. S. 280	6
McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. 582	15
McNamer Realty Co. v. Sunburst etc. Co., 76 Mont. 332, 247 Pac. 166	3
Mettler v. Ames Realty Co., 61 Mont. 152, 201 Pac. 702	14
Nadeau v. Texas Company, 104 Mont. 558, 69 Pac. (2d) 586	12
Ruhlin v. New York Life Ins. Co., 304 U. S. 202	7
Sauder v. Mid-Continent Petroleum Corp., 292 U. S. 272	11
Severson v. Barstow, 103 Mont. 526	11

Statutes

Section 6850, Revised Codes of Montana, 1935	15

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PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF.

ARGUMENT

SUMMARY

Argument herein will consist of petitioners' reply, first to respondents' statement that petitioners' contention in the District Court and the Circuit Court of Appeals was that the lease terminated because respondents breached an implied covenant in the lease to market the oil, and, second, to respondents' statement that petitioners submitted the case to the Circuit Court of Appeals on the theory that the Montana Supreme Court had not passed directly upon the point involved. This will be followed by replies to other contentions in respondents' brief.

(Note): References to the record are designated "R", and all emphasis by underscoring are by the authors of this Brief.

I.

A.

STATEMENTS IN RESPONDENTS' BRIEF THAT PETITIONERS CONTENDED IN THE TRIAL COURT AND IN THE CIRCUIT COURT OF APPEALS THAT THE LEASE TERMINATED BECAUSE RESPONDENTS BREACHED AN IMPLIED COVENANT TO MARKET OIL ARE NOT SUSTAINED BY THE RECORD.

Respondents state that petitioners contended in the trial court and the Circuit Court of Appeals that the lease was terminated because respondents breached an implied covenant to market oil. They say:

> "Ignoring this expressed covenant, petitioners now assert that because the wells were shut in for lack of market or storage facilities, from the latter part of January, 1938, to about March 1, 1939, the lease automatically terminated as of January 1, 1938.
>
> This assertion was first made when the suit was filed, on February 6, 1940," (Resps'. Br. 14 & 15), and
>
> "The contention of petitioners is that respondents breached an implied covenant in the lease to market the oil." (Resps.' Br. 15).

See also: Statements on pp. 20, 26 & 27 of Respondents' Brief.

No reference to the record is made in support of those statements and petitioners respectfully assert that they are not borne out by the record.

Petitioners have never made any claim that the lease was either "terminated" or "forfeited" by reason of respondents' failure to market oil. Their

contention has always been, as in this Court, that cessation of production automatically terminated the lease pursuant to the "thereafter" clause. They have always contended that the matters set forth in paragraph XII of the amended answer (R. 27-38), including alleged lack of market and facilities for storing oil, were matters of affirmative defense which could not be availed of in an action of this kind. All of the evidence in support of those allegations went in over petitioners' objection that it was immaterial and did not pertain to any issue involved in this case (R. 117, 118, 124, 127, 130, 132, 167, 168, 170, 175, 177, 178, 179, 182 & 183).

Petitioners' theory is aptly described by the Supreme Court of Montana in *McNamer Realty Co. v. Sunburst etc. Co.*, 76 Mont. 332, 247 Pac. 166, as follows:

> "The court was asked, not to declare a forfeiture, but 'to ascertain whether a completed forfeiture existed, and, if so, to remove the cloud.' (*Merk v. Bowery Mining Co.*, 31 Mont. 298, 78 Pac. 519). Under the facts and circumstances shown, as heretofore discussed, the equitable rules as to relief from a forfeiture cannot be applied." (76 Mont. @ 350-351).

B.

RESPONDENTS' STATEMENT THAT PETITIONERS SUBMITTED THIS CASE TO THE CIRCUIT COURT OF APPEALS UPON THE THEORY THAT THE SUPREME COURT OF MONTANA HAD NOT PASSED DIRECTLY UPON THE POINT INVOLVED IS NOT SUSTAINED BY THE RECORD.

At page 9 of their brief respondents say that petitioners,

> "took the position that there was not any decision of the Supreme Court of Montana directly in point"

and

> "submitted the case to the Circuit Court of Appeals on the theory that the Montana Supreme Court had not passed directly upon the point."

To support those statements, they quote from page 26 of petitioners' original brief in the Circuit Court of Appeals. Briefs are not a part of the record in this Court and we understand the rule to be that the presentation of a matter to this Court must be based entirely upon the record.

Petitioners do not know the purpose of the statements referred to. However, they do know that this Court will not consider questions raised for the first time here and which were not presented to the courts below and that, under that rule, the effect of the statements referred to, if unexplained, might result in this Court's denial of the Petition for Writ of Certiorari, without further consideration.

Petitioners were able to meet respondents' statement referred to in sub-title "A" above by reference to the record, but know of no way to meet the statements last referred to, other than from the source, outside the record, to which respondents resorted, to-wit: the briefs, and, under the circumstances, feel fully justified in so doing.

The statement from petitioners' original brief, quoted and relied upon by respondents, was fully

explained at pages 12 and 13 of petitioners' reply brief in the Circuit Court of Appeals as follows:

> "At Page 26 of their brief Appellees say:
>
> 'Appellants contend that there is no decision of the Supreme Court of Montana to the effect that failure to pump oil from a lease results in the termination of the lease.'
>
> As disclosed by our original brief (pp. 26-30) and this brief, our contention is absolutely the contrary. Perhaps, our statement (Br. 26) prefacing our quotations from *Berthelote v. Loy Oil Co.* (Br. 26-29) and *Griffith v. Cedar Creek Oil & Gas Co.* (Br. 29-30) was not clear. What we attempted to say and what we mean is that, while there is no Montana case wherein an oil and gas lease has been held to be terminated by non-production of oil as distinguished from gas, our Supreme Court in those two cases decided that cessation of production of oil as distinguished from gas results in a termination of the lease under the habendum clause, regardless of lack of market or due diligence on the part of the lessee."

At page 34 of their original brief in the Circuit Court of Appeals petitioners, referring to the *Severson* case, said:

> "The district court overlooked the fact that, under *Erie R. Co. v. Tompkins*, this rule is controlling in this case. In the opinion it said: 'The argument that a different rule should be observed where oil is the product involved is not convincing under the authorities examined.' (Tr. 67).
>
> The above quotation from the *Severson* case is more than argument. It is the rule announced by the Supreme Court of Montana."

II.

REPLY TO RESPONDENTS' ASSERTION IN PART II OF THEIR BRIEF THAT PETITIONERS STATE NO VALID GROUNDS FOR THE ISSUANCE OF WRIT OF CERTIORARI.

For answer to petitioners' contention that the decision of the Circuit Court of Appeals in this case is in conflict with the decisions of the Supreme Court of Montana, respondents cite and rely on *MacGregor v. State Mutual Life Assur. Co.*, 315 U. S. 280. (Resps.' Br. p. 11). In that case this Court held that an interpretation of a Michigan statute by the Federal Court would not be disturbed because there was no decision of the Supreme Court of Michigan construing the statute in question. In the case at bar the decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Montana, which are specifically pointed out in petitioners original brief.

Respondents further contend that the fact that the decision of the Circuit Court of Appeals in this case is in conflict with that of the Circuit Court of Appeals for the Tenth Circuit in *Continental Oil Co. v. Osage Oil & Ref. Co.*, 69 Fed .(2d) 19, is not a reason for granting the petition for writ of certiorari herein. They say that if each circuit is to apply the law of the state whence a case is lodged, there must, necessarily, be a conflict between decisions of Circuit Courts of Appeal. Petitioners' view of this is that where the law of two states, for instance Montana and Oklahoma, is the same upon a given question, the decisions of the Circuit Courts of Ap-

peal from the two circuits in which those states are situated should be in accord.

As pointed out in petitioners' original brief (pp. 19 & 20), the Supreme Court of Montana, in stating in the *Severson* case that "a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided", adopted and followed the law of Oklahoma. *Continental Oil Co. v. Osage Oil & Ref. Co.* came up from the United States District Court for the Northern District of Oklahoma.

In paragraph 5 of Rule 38 of this Court the statement is made that the ground for granting certiorari there set forth do not fully measure the court's discretion, and we respectfully submit that the second reason upon which we rely herein is a substantial and additional reason warranting the granting of the Petition for Writ of Certiorari in this case.

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, cited at pages 12 & 13 of respondents' brief, does not support respondents' contention that a conflict between decisions of Circuit Courts of Appeal is not a reason for granting certiorari. What this Court said in that case is that:

> "As to questions controlled by state courts, conflict among circuits is not of itself, a reason for granting a writ of certiorari". (304 U. S. at 206).

No attempt was made by the petitioner in that case to show that the decision of the Circuit Court of Appeals was also in conflict with the law of Pennsylvania.

Respondents say:

> "The question is of no more importance than any other question which arises out of the application of the law of oil and gas to the facts in any case involving such law." (Resps. Br. 13).

In its decision in this case, the Circuit Court of Appeals said:

> "And the storage of the oil underground was as effective as its storage in surface tanks, and obviously more economical." (R. 479).

The "thereafter" clause of the lease involved in this case reads:

> "It is agreed that this lease shall remain in force for a term of five years from this date and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee." (R. 6).

And the lease further provides:

> "In consideration of the premises the said lessee covenants and agrees:
> First. To deliver to the credit of lessor free of cost, in the pipe line to which lessee may connect his wells, the equal one-eighth (1/8) part of all oil and gas produced and saved from said leased premises." (R. 7).

The lease in the case at bar was on a printed form known as "Producers 88" (R. 6) and, as indicated by a letter from the President of respondent Barnes, Butler Oil Company to petitioner Jane M. Stimson, dated September 26, 1937, is the form of oil and gas lease generally used in Montana. (R. 434).

As construed by the Circuit Court of Appeals, a lessee, under this form of lease, may cease production of oil from the leased premises and fail to deliver any oil "to the credit of the lessor".

The obvious purpose of entering into an oil lease such as is involved in this case is that, in the event oil is discovered by the lessee, the lessor shall receive continuously one-eighth of all the oil which can be produced from the premises.

In making the statement "the storage of the oil underground was as effective as its storage in surface tanks," the Circuit Court of Appeals, in effect, decided that the lessee is performing the important covenant above quoted and, if this decision is allowed to stand, it will vitiate the most vital provision of practically every oil lease in the State of Montana.

Just what does the statement of the Circuit Court of Appeals that "the storage of the oil underground was as effective as its storage in surface tanks," mean? Petitioners submit that it can only mean that leaving the oil undisturbed in the ground is the same thing as producing the oil and, in effect, nullifies not only the clear language of the lease but the decisions of the Supreme Court of Montana cited by the petitioners.

Certainly the question involved in this case is of more importance than those usually presented in cases involving the law of oil and gas leases.

III.

PETITIONERS WERE NOT REQUIRED TO GIVE NOTICE OF INTENTION TO DECLARE THE LEASE FORFEITED FOR FAILURE TO PRODUCE OIL.

Respondents contend that the provision of the lease quoted on page 5 of their brief, which is commonly known as the "forfeiture clause", required petitioners to give notice of intention to declare the lease forfeited. (Resps. Br. pp. 14, 21 & 24).

This contention and the authorities cited in support thereof in Part III (pp. 14-24) of their brief disclose that respondents ignore the distinction between a "forfeiture" and "termination ipso facto" pursuant to the "thereafter" clause, and is, therefore, not applicable to the question presented here. (See pages 29 to 31 of petitioners' original brief.)

IV.

NO QUESTION OF IMPLIED COVENANT TO MARKET OIL IS INVOLVED IN THE AUTOMATIC TERMINATION OF A LEASE, PURSUANT TO THE THEREAFTER CLAUSE, BY REASON OF CESSATION OF PRODUCTION OF OIL.

Respondents contend that the cessation of production of oil did not terminate the lease for the reason that there was an implied covenant to market oil, and that, in the absence of a market, due diligence on their part excused compliance with this implied covenant. (Resps. Br. pp. 9, 10, 15 & 20).

While such a contention may be involved in a question of "forfeiture", it is not involved in this case, as is pointed out by the authorities and argument at pages 29 to 31 of petitioners' original brief. We ask the Court to keep in mind the fact that the lease herein contains no agreement or promise on the part of the lessees to continue production and

that, by reason of the provisions of the "thereafter" clause, it was optional with respondents to cease production at any time and allow the lease to terminate just as they did in this case.

In support of this contention and their contention that notice was required, respondents cite and quote from *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801. (Resps. Br. pp. 16 & 17). That case involved a forfeiture and not automatic termination under a "thereafter" clause. Also, it involved gas and not oil, and the lessors had declared the lease forfeited for failure of the lessees to pay an annual rent of $50.00 for wells on the property from which gas was used off the premises. No question as to the delivery of a part or percentage of the product to the credit of the lessor was involved. It is true that the *Brewster* case is cited in the *Berthelote* case (95 Mont. @ 446), and in the *Severson* case (103 Mont. @ 535) but in neither of those cases is it cited upon the question involved here.

Respondents also cite *Sauder v. Mid-Continent Petroleum Corp.*, 292 U. S. 272. (Resps.' Br. 16). That case can have no application here for, as there said by this Court:

> "The question for decision is whether the respondent failed to comply with an implied covenant to develop the tract with reasonable diligence."

The development referred to was the drilling of wells. (292 U. S. @ 276 to 277).

V.

NO QUESTION OF WAIVER OF ANY RIGHT BY THE LESSORS IS INVOLVED IN THIS CASE.

Respondents claim that petitioners waived their right to declare a "forfeiture" by failing to give notice. No question of "forfeiture" is involved in this case. (See Petitioners' Orig. Br., pp. 29 to 31).

Respondents also claim that petitioners waived their right to declare a "forfeiture" upon another ground, to-wit: upon the ground that petitioners had accepted royalties after production ceased. This claim is not sustained by the record. At the top of page 15 of their brief, they make the statement that after the wells on petitioners' land were reopened, respondent Tarrant paid the landowners' royalties to the administrator of the estate of petitioners' ancestor and that the administrator was in possession of the royalties at the time of the trial of the suit, and, at page 22 of their brief, cite *Nadeau v. Texas Co.*, 104 Mont. 558, 69 Pac. (2d) 586, wherein the court said:

> "A lessor in an 'unless' lease waives his power to declare a forfeiture for failure to drill or pay rentals within the time designated by the lease, by the acceptance of delay rentals after the breach has occurred." (104 Mont. at 564).

This is a further indication that respondents have confused "forfeiture" with automatic "termination" of a lease under the "thereafter" clause. The following portions of the Record disclose that respond-

ent Tarrant has never paid the landowners' royalties for oil produced after the wells were re-opened.

On November 2, 1940, approximately nine months after this suit was commenced, respondent Tarrant turned eighteen checks over to his Office Manager, Mr. Henry, who was the Administrator of the Estate of Alice Long Miller (R. 294). These checks were payable to the petitioners and their brother, Robert L. Morrow (R. 251 & 252). Petitioners were never notified that the checks had been issued or turned over to Mr. Henry (R. 299). Mr. Henry had no authority to endorse them. He testified that they were made out to keep Mr. Tarrant's royalty record straight and that they would be retired and either money or new checks substituted for them when the Miller Estate was ready for distribution (R. 303). Under the circumstances, those checks were but scraps of paper and certainly did not constitute payment.

VI.

REPLY TO RESPONDENTS' ARGUMENT AS TO DICTUM. (RESPONDENTS' BRIEF PP. 19 & 20).

For answer to petitioners' contention that the language of the Supreme Court of Montana in the *Severson* case that:

> "a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided"

is not dictum, respondents cite *Empire Theatre Co. v. Cloke*, 53 Mont. 183, 163 Pac. 107, and *Mettler v.*

Ames Really Co., 61 Mont. 152, 201 Pac. 702 (Resps. Br. 19 & 20).

In the *Empire Theatre Co.* case the Montana court decided that the language which was claimed to be dicture was not dictum (see 53 Mont. at 190 & 191).

Petitioners submit that respondents have not explained away the definitions of dictum in the cases cited and discussed at pages 23-26 of petitioners' original brief.

VII.

REPLY TO RESPONDENTS' ARGUMENT CONCERNING THE CONSTRUCTION OF AN OIL AND GAS LEASE. (RESPONDENTS' BRIEF 21 & 22).

In support of their argument as to how they claim the lease should be construed, respondents first cite and quote from *Hinerman v. Baldwin*, 67 Mont. 417, 215 Pac. 1103. Petitioners have no quarrel with the rules of construction there announced.

Respondents also say that a "lease must be read as a whole and, if possible, every part be given effect". (Resps. Br. 22). This is true, subject to the qualifications pointed out by the Supreme Court of Montana in *Johnson v. Metropolitan Life Ins. Co.*, 107 Mont. 133, 83 Pac. (2d) 922, as follows:

> "if there is no ambiguity, and the provisions of the contract of insurance are plain and clear and lend themselves to but one construction, it is the duty of the court to give to the contract that one plain and clear construction, and not to attempt to re-write for the parties a contract differing from the one to which the parties

> agreed. In this latter respect a contract of insurance does not differ in its construction from any other contract. It is incumbent on this court to examine the four corners of this contract to determine whether such ambiguity exists (*Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67; *Kurth v. National Life & Acc. Ins. Co.*, (Tex. Civ. App.), 79 S. W. (2d) 338), and if it does not, then this court is powerless to make a contract for the parties contrary to the one expressed in the agreement." (107 Mont. @144).

The "thereafter" clause of the lease in the case at bar is clear and free from ambiguity.

In the lease in this case the "forfeiture" clause follows the "habendum" clause and, in *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582, cited at page 22 of respondents' brief, the Montana Court said:

> "Furthermore, the forfeiture clause follows the habendum clause, the 'unless' clause and other essential parts of the lease. And Section 6853, Revised Codes of 1921 provides that if several parts of a grant are absolutely irreconcilable the former part prevails." (75 Mont. @ 368).

We also call attention to Section 6850 of the Revised Codes of Montana of 1935, which reads:

> "Limitations—How Controlled. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct."

See also Parts B and D of petitioners original brief (pp. 18-23 & 26-29).

VIII.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF MONTANA (PART II OF RESPONDENTS' BRIEF).

The contention of respondents contained in this part of their brief (pp. 25-29) is so completely answered by petitioners' original brief as to require no reply, except to point out that the lease involved in the case of *Continental Oil Co. v. Osage Oil & Refining Co.*, 69 Fed. (2d) 19, was declared terminated by reason of cessation of production and not by "abandonment" by the lessee, as stated at page 28 of respondents' brief. The court said:

> "A finding by the Secretary of the Interior that the Osage Company was not producing oil and gas from the lease on August 27, 1923, and that the lease terminated on that date would be binding on the courts in the absence of a showing that the Secretary's action was arbitrary or fraudulent." (69 Fed. (2d) @ 27).

At page 29 of their brief, respondents cite *Alabama Power Co. v. Ickes*, 302 U. S. 464, in reply to Part H of petitioners' original brief. This makes it clear that they failed to understand that the undisputed facts referred to on pages 34 and 35 of petitioners' original brief were not mentioned in connection with the findings of fact but solely for the purpose of illustrating the importance of the questions involved.

IX.

REPLY TO RESPONDENTS' STATEMENT OF "FACTS SUPPLEMENTAL TO THOSE STATED IN PETITION AND BRIEF OF PETITIONERS." (RESPONDENTS' BRIEF, PART I, PP. 1-10).

Petitioners want to be sure that it is "crystal clear" that they do not ask this Court to review the evidence and that they contend that the question of law presented, to-wit: "Did the lease terminate upon cessation of production of oil pursuant to the provisions of the 'thereafter' clause?" depends entirely upon undisputed facts. Every fact referred to in petitioners' "SUMMARY STATEMENT OF THE MATTER INVOLVED" in the petition (pp. 1 to 5) is of that character.

That question of law depends solely upon the language of the lease and the admitted fact that production of oil from petitioners' land ceased in January, 1938. Overlooking this, ~~petitioners~~ respondents, in part I of their brief, refer to certain matters which are dependent upon evidence introduced in support of the allegations of paragraph XII of the amended answer and in rebuttal thereto. As hereinbefore pointed out, petitioners contend that matters of affirmative defense are not involved in an action of this kind (this brief, p. 3). However, since respondents have referred to such matters of evidence, petitioners believe it proper to clarify and direct the Court's attention to contradictory evidence and the fact that such evidence clearly illustrates the effect of the decision of the Circuit Court of Appeals herein.

At page 7 of their brief, respondents say that Tarrant kept the petitioners informed as to the situation with respect to a lack of market or storage facilities and refer to 12 parts of the Record. These references are to letters which respondent Tarrant wrote to petitioners and their brother between November 15, 1937 and March 4, 1939.

Instead of informing them as to the situation with respect to market, he told them that he had no market when, in fact, he was marketing oil from other leases which he owned or operated in the immediate vicinity of their land, during the entire period of non-production from their land. (Rr. 105, 355 & 357).

In his letter of December 13, 1937 (R. 191) he said:

> "I am making a long term contract on part of my production whereby they are supposed to start taking the oil in March."

He did not tell them that 6 days prior to that time he had made a contract with the Yale Oil Corporation (R. 147-159) for the sale of 550 barrels of oil a day from lands which he designated therein. Neither did he tell them that he had not included the North Half of their land, from which oil could be produced and in which he had retained less than 30% of the oil, (R. 190) nor that he had included the South Half of their tract, in which no oil had been found but in which he still retained 65% of the oil. (R. 190).

In his letter of March 4, 1939, (R. 426) he told petitioners that he had had 25 wells shut down for 14

months, and the fact was that he had had only 14 wells shut down and had been producing from 27 other wells. (R. 357).

On page 6 of their brief, respondents point out how much Mr. Tarrant spent in drilling wells and in operating the lease and refer to a statement which he introduced over petitioners' objection at the trial. (Rr. 179). This statement indicates that he had suffered a loss. By his sub-lease (R. 12-14) he was entitled to 80% of the oil produced from petitioners' land but he elected to and had sold 15 of his 80% from the South Half of the tract and 53 of his 80% from the North Half, (R. 190) at an average price of $1000 per 1%, or a total of $68,000. This is not disclosed in the statement at page 179 of the Record. Had he not sold these royalties, he would have retained 80% of the $203,000 realized from the sale of oil from petitioners' land, or approximately $162,000.

On page 7 of their brief, respondents point out that Mr. Tarrant was not in privity with the petitioners, but respondent Barnes, Butler Oil Company was. The President of that Company wrote petitioner Stimson, on September 26, 1937, that the sub-lease to respondent Tarrant "embodies all of form 'Producers 88' Montana" (R. 434). A comparison of the lease and the sub-lease discloses that there is no similarity. Respondent Tarrant testified as to what the Barnes, Butler Oil Company did. He said:

> "Q. Well so far as the operation of the lease is concerned, has the Barnes, Butler Oil Com-

pany participated in it at all, except to get its royalties?

A. Not at all." (R. 131).

Petitioners had a right to rely on their lessee, Barnes, Butler Oil Company, to see that the lease was operated fairly. Petitioners lived on the Pacific Coast (R. 1) and did not learn that Mr. Tarrant had been marketing oil from other lands during the period of non-production from their land, nor that he had resumed production from their land in March, 1939, until September 13, 1939. (R. 436-439).

We believe that this Court will, with this understanding of the Record, agree that the evidence referred to by respondents in Part I of their brief clearly illustrates how the rights of any lessor may be trifled with if the decision in this case is allowed to stand.

Having fully replied to all new matters referred to in respondents' brief, petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

Dated, Helena, Montana, May 2, 1943.

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